U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship
and Immigration
Services

[redacted]

FILE: WAC 03 131 51033 Office: CALIFORNIA SERVICE CENTER Date: NOV 01 2004

IN RE: Petitioner: [redacted]
Beneficiar[redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 7, 1998. The proffered wage as stated on the Form ETA 750 is $12 per hour, which equals $24,960 per year.

The owner of the petitioning restaurant when the Form ETA 750, Part B, was submitted, was [redacted] The alien's name, as originally typed on the Form ETA 750, Part A, is [redacted] The alien's name, as typed on a second Form ETA 750, Part B, is [redacted] The name shown on the Form I-140 petition is also [redacted] With the petition, counsel submitted a letter, from the petitioner, dated February 20, 2003, stating that the petitioner was substituting Jasvir Singh as the beneficiary.

[1] The petitioner subsequently corrected the original beneficiary's name to "Harjinder Singh."

On the petition, the petitioner stated that it was established during 2000 and that it employs five workers. On the Form ETA 750B, signed by the beneficiary on February 25, 2003, the beneficiary did not claim to have worked for the petitioner.[2]

In support of the petition, counsel submitted copies of the petitioner's 2002 Form W-2 Wage and Tax Statements, its 2002 W-3 Transmittal, and its Form 940-EZ Employer's Annual Federal Unemployment Tax (FUTA) Return. Those forms show that the petitioner employed twelve workers during that year, whom it paid a total of $142,478.77. Notwithstanding that the beneficiary named on the Form ETA 750 Part [redacted] did not claim to have worked for the petitioner on the Form ETA 750, Part B, one of the W-2 forms submitted showed that the petitioner paid Jasvir Singh $27,200 in wages during 2002.

Further, counsel submitted its California Form DE-6 Quarterly Wage and Tax Report for the last quarter of 2002. That report indicates that the petitioner employed the beneficiary during that quarter and paid him $10,400. Further still, counsel submitted pay stubs for the pay periods ending December 22, 2002, December 29, 2002, January 5, 2003, January 12, 2003, January 19, 2003, and January 26, 2003. Those pay stubs show that the petitioner paid the beneficiary $800 during each of those one-week pay periods. The December 29, 2002 stub shows a year-to-date total of $27,200.

Finally, counsel submitted the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $19,535. The corresponding Schedule L shows that the petitioner ended that year with current assets of $1,100 and no current liabilities, which yields net current assets of $1,100.

The file also contains responses, dated November 22, 1999, and April 19, 2000, to requests for evidence that were apparently issued pursuant to a previous petition by the instant petitioner. The November 22, 1999 response indicates that the restaurant changed ownership on April 1, 1999, and that Mr. [redacted] acquired restaurant.

Because the evidence submitted was insufficient to demonstrate the petitioner's ability to pay the proffered wage, the California Service Center, on June 13, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence be in the form of copies of annual reports, federal tax returns, or audited financial statements and show the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center also requested that the petitioner explain the discrepancy between having claimed to have five workers, and having submitted W-2 forms for twelve workers.

In response, counsel submitted a letter, dated August 25, 2003. Counsel explained the discrepancy between the number of employees claimed on the Form I-140 and the number of W-2 forms submitted by stating that

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[2] The instructions for the Form ETA 750, Part B, request that the beneficiary list all of his employment during the previous three years and all employment relevant to the proffered position. The final entry on that employment history states that the beneficiary worked as a chef for Kamal Palace, of Pacific Coast Highway in Long Beach, California, from April 1996 through August 1998.

the petitioner, on the Form I-140, was stating the number of full-time workers it employs. Counsel stated that the remaining seven workers evidenced by W-2 forms are part-time workers or independent contractors.[3]

Counsel submitted what purport to be the petitioner's 1998, 1999, 2000, and 2001 Form 1120 U.S. Corporation Income Tax Returns, and an additional copy of its 2002 return.

The 1998 return covers the period from September 8, 1998 through the end of that year. That return shows that during that period the petitioner declared a loss of $810 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had $10,390 in current assets and $800 in current liabilities, which yields $9,590 in net current assets.

The 1999 return shows that during that year the petitioner declared a loss of $1,320 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner had $6,170 in current assets and $800 in current liabilities, which yields $5,370 in net current assets.

The 2000 return shows that during that year the petitioner declared a loss of $32,141 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2001 return shows that during that year the petitioner declared taxable income before net operating loss deduction and special deductions of $6,647. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also submitted copies of 2000, 2001, and 2002 W-2 forms and a letter, dated July 15, 2003, from the petitioner's accountant. The W-2 forms show that the petitioner paid the beneficiary $17,600, $41,600, and $27,200 during those years, respectively. The accountant's letter asserts that the petitioner's 2002 taxable income before net operating loss deduction and special deductions, the wages it actually paid to the beneficiary during 2002, and the compensation paid to officers during that year, added together, equal $83,935, which amount is more than sufficient to pay the proffered wage.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 5, 2003, denied the petition.

On appeal, counsel submits his own letter, dated October 2, 2003, and the letter of another attorney, dated September 29, 2003.

Counsel asserts that the restaurant operated during 1999 as a sole proprietorship and paid salaries of $46,200. Counsel asserts that the amount of its salaries during 1999 shows the ability to pay the proffered wage during

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[3] Noting that the petitioner utilizes independent contractors explains no part of that discrepancy, as amounts paid to independent contractors are recorded on a Form 1099, rather than a Form W-2.

that year. Counsel states that the petitioner is amending the W-2 forms it filed showing the wages it paid to the beneficiary during that year. The petitioner states that the amended amounts are $25,000 during 2000 and $33,200 for 2001. Counsel notes that those amounts exceed the proffered wage.

The other attorney notes that he is also a CPA and specializes in taxation. That attorney states that,

> Generally accepted accounting principles (GAAP) and IRS regulations recognize that the breaking of the accounting data in tax years is an artificial exercise and results in distortions of data that does (sic) not reflect the true financial picture of the company. For this reason, the IRS regulations permits (sic) the carry back and carry forward of net losses . . . .

Apparently relying on that justification, the other attorney states that

> The petitioner is hereby amending the W-2's it filed with the IRS regarding the beneficiary for the years 2001 and 2000. The new and amende3d W-2's will show wages of $25,000 for 2000 and $33,200 for the year 2001 for a total of $58,200. This meets the proffered wages for the position for both years.

Accompanying that letter are two Forms W-3c purporting to amend the amounts paid to the beneficiary from $17,600 during 2000 and $41,600 during 2001 to $25,000 during 2000 and $33,200 during those years. Those forms contain no indication that they were filed with IRS.

Counsel also submitted the joint 1999 Form 1040 U.S. Individual Tax Return of the petitioner's current owner, [redacted] and the owner's spouse. The corresponding Schedule C submitted with that return shows that the petitioner returned a profit of $10,141 during that year. The petitioner's owner and owner's spouse declared adjusted gross income of $8,019 during that year, including the petitioner's entire profit offset by deductions.

The argument of the petitioner's accountant, contained in the July 15, 2003 letter, that the petitioner's compensation paid to officers was a fund available to pay the proffered wage, is unconvincing. The record contains no evidence that the petitioner is not obliged by contract to pay compensation to its officers.

Counsel's argument on appeal, that the total wages paid by the petitioner during a given year are evidence of its ability to pay the proffered wage during that year, is similarly unconvincing. Showing that the paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[4] or otherwise increased its net income,[5] the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is

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[4] The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employees wages, and that those obviated wages would be sufficient to cover the proffered wage.

[5] The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

Petitioner's counsel of record and another attorney both assert that the petitioner is amending the W-2 forms. In support of that assertion, counsel submitted forms showing amended entries. Counsel submitted no evidence, however, that those amendments were ever communicated to IRS. Despite the observation that division of income and expenses into discrete calendar years is arbitrary, counsel is unable to transfer income and expenses to other years by fiat, as necessary to render this petition approvable.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner employed and paid the beneficiary \$17,600 during 2000, \$41,600 during 2001, and \$27,200 during 2002.[6]

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983).

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$24,960 per year. The priority date is December 7, 1998.

The record indicates that the petitioning restaurant changed ownership on April 1, 1999. The petitioner is obliged to demonstrate that the original petitioner, under Kanwaijit Singh, the restaurant's previous owner,

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[6] This office is troubled by the fact that the beneficiary failed to declare his employment for the petitioner on the Form ETA 750, Part B. Nevertheless, in view of the evidence submitted, this office shall regard as proven that the petitioner employed the beneficiary and paid him the amounts shown on the W-2 forms during the years those forms indicate.

had the ability to pay the proffered wage from December 7, 1998 through March 30, 1999.[7] No evidence in support of that proposition was submitted. The petitioner has not demonstrated the ability to pay the proffered wage from December 7, 1998 through March 30, 1999.

From April 1, 1999 through the end of that year, [redacted] allegedly owned the petitioning restaurant as a sole proprietorship. The 1998 and 1999 Form 1120 U.S. Corporation Income Tax Returns submitted, therefore, are irrelevant to the instant case, as the instant petitioner, Cheema, Inc., did not then own the petitioning restaurant.

During the period from April 1, 1999 through December 31, 1999, the petitioner is obliged to show that [redacted] was able to pay the proffered wage. The petitioner returned a profit of $10,141 during that year. That amount is insufficient to pay the proffered wage. The petitioner's owner and owner's spouse declared adjusted gross income of $8,019 during that year, including the petitioner's entire profit. That amount is also insufficient to pay the proffered wage. No evidence was submitted that any other funds were available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage from April 1, 1999 to the end of that year.

During 2000 the petitioner paid the beneficiary $17,600. The petitioner must show the ability to pay the $7,360 balance of the proffered wage.[8] The petitioner declared a loss during that year, however. The petitioner cannot show the ability to pay any portion of the proffered wage out of its profits. The petitioner ended that year with negative net current assets. The petitioner cannot show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner paid the beneficiary $41,600. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner paid the beneficiary $27,200. That amount exceeds the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that the petitioner had the ability to pay the proffered wage during the period from December 7, 1998 through March 30, 1999. The petitioner failed to show the ability to pay the proffered wage during the period from April 1, 1999 through December 31, 1999. The petitioner also failed to show the ability to pay the proffered wage during 2000. Therefore, the petitioner has not established that, under its two different owners and two different forms of ownership since the priority date, it had the continuing ability to pay the proffered wage beginning on the priority date.

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[7] A November 22, 1999 letter in the record indicates that ownership of the restaurant changed on April 1, 1999. The successor-at-interest petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *See Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

[8] $24,960 - $17,600 = $7,360.

In addition to the basis of the director's decision, another issue exists in this case. The petitioning restaurant changed ownership since the priority date. In addition, under its current owner, the petitioner changed the form of its ownership, from sole proprietorship to a corporation. In both of those instances, the petitioner is obliged to submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. *See Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

In this case, the petitioner submitted no evidence of either change in ownership, nor any evidence that the changes in ownership involved the assumption of all of the rights, duties, obligations, and assets of the previous owner.[9] The petition should also have been denied upon that ground.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[9] In the instance of the change from sole proprietorship to corporate ownership, although the same person owned the restaurant initially and owned the corporation after the change, two different entities, the individual and then the corporation owned the restaurant. In that event the petitioner is still obliged to comply with the requirements of *Dial Repair Shop*, supra.